Supreme Court, U.S.
FILED

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No. _____
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IN THE

Supreme Court of the United States

October Term, 1996

JOSEPH COSENTINO; ANTHONY MAGANA,
Petitioners-Appellants,

-against-

WALTER KELLY, SUPERINTENDENT OF ATTICA CORRECTIONAL FACILITY; DANIEL SENDOWSKI, SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY,
Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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39 pp

QUESTIONS PRESENTED

1. Whether the closure of the courtroom at petitioners' second trial to their wives and one son, who were unruly at the first trial, should be governed by the factors enumerated in *Waller v. Georgia*, 467 U.S. 39 (1984).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are those named in the caption

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF CASES AND AUTHORITIES iv

CITATION TO OPINION BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

1. The decision below raises a significant question concerning whether the factors enumerated in *Waller v. Georgia*, 467 U.S. 39 (1984) should be considered in closing the courtroom to individuals who were disruptive at a first trial 6

CONCLUSION 9

APPENDIX
TABLE OF CONTENTS

Pages

United States Court of Appeals
For The Second Circuit 1a-8a

United States District Court
Southern District of New York..... 9a-24a

TABLE OF AUTHORITIES

Cases *Pages*

Ayala v. Speckard, 89 F.3d (2d Cir. 1996) 8

In re Oliver, 333 U.S. 257, 273 (1948) 6,8

People v. Consentino, 198 A.D.2d 294, 603 N.Y.S. 2d 560 (2d Dept. 1993) 5

People v. Consentino 83 N.Y.2d 909, 614 N.Y.S.2d 394 (1994) 5

People v. Magana, 198 A.D.2d 306, 603 N.Y.S.2d 772 (2d Dept. 1993) 5

People v. Magana, 82 N.Y.2d 927, 610 N.Y.S.2d 179 (1984) 5

United States v. Hernandez, 608 F.2d 927, 610 N.Y.S.2d 772 (2d Dept. 1993) 6,7

United States v. ex rel Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965)(Lumbard, C.J.), *cert. denied,* 384 U.S. 1008 (1966) 6

Vidal v. Williams, 31 F.3d 67(2d Cir. 1994) 7, 8

Waller v. Georgia, 467 U.S. 39 (1984) 5, 6, 7, 8

In the Supreme Court of the United States
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JOSEPH COSENTINO; ANTHONY MAGANA,
Petitioners-Appellants,

-against-

WALTER KELLY, SUPERINTENDENT OF ATTICA CORRECTIONAL FACILITY; DANIEL SENDOWSKI, SUPERINTENDENT OF CLINTON CORRECTIONAL FACILITY,
Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioners Joseph Cosentino and Anthony Magana petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is not yet reported and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1996. A petition for hearing was denied on February 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioners Anthony MagAna and Joseph Cosentino each were charged with the crimes of murder in the second degree, criminal use of a firearm in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), and criminal possession of a weapon in the third degree (three counts). Both indictments charged that petitioners aided, abetted, and acted in concert with one another to accomplish the murder of John Petrucelli in White Plains, New York on September 13, 1989.[1]

The first jury trial in this matter commenced on October 1, 1990 before the Honorable Donald Silverman, County Court, Westchester County. The jury completed deliberations on October 31, 1990, and informed the court that it had reached a verdict. Prior to bringing the jury into courtroom, the court cautioned spectators to maintain control of themselves when the verdict was read. After the jury entered the courtroom, the court asked the jury what verdict it had reached with respect to the first count charging petitioner Magana with murder in the second degree. The jury foreperson responded, "Guilty, your Honor." At this point, a major disruption ensued

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1. Petitioners' indictments were subsequently ordered consolidated for purposes of trial.

involving family members and friends of petitioners, and certain spectators had to be removed from the courtroom. The jury foreperson then announced guilty verdicts for the remaining counts which were submitted for their consideration. The court then ordered a recess, and a court officer removed everyone from the courtroom.

The jury later re-entered the courtroom, at which time the court expressed its apologies for the earlier disruption. When the jury was polled, two of the jurors changed their verdicts, and a third juror was unsure. Another juror addressed the court stating, "The jury has completely fallen apart at this particular time, judge, because of what happened in this courtroom must now and that -- none of us, I think, can right now give anything a fair answer of any kind. I'm sorry." Trial Transcript at 1724-1725 (Oct. 31, 1990).

After the jury was excused, both defense attorneys moved for a mistrial. The court stated, on the record, the essence of the disruption that had just occurred in the courtroom. Specifically, the court stated that "at the time the verdict was announced there was a great many members of the [petitioners'] family, friends here, I say 10 to 15 and not all of them but a good many of them just went absolutely off the wall yelling and screaming, several had to be physically restrained, taken out of the courtroom, we had quite a scene here..." Trial Transcript, at 1725-1726 (Oct. 31, 1990).[2]

---

2. This portion of the record reads in full as follows:

THE COURT: Let me just state for the record that which is not already on the record and that is that at the time that the verdict was announced there were a great many members of the Defendants' family, friends here, I say 10 to 15 and not all of them but a good many of them just went absolutely of the wall yelling and screaming, several had to be physically restrained, taken out of the courtroom, we had quite a scene here.

The matter was then adjourned to the following morning.

The following morning, both defense attorneys renewed their motions for a mistrial, which were denied. A curative instruction was given to the jury, but, after several more hours of deliberation and several read backs, the jury sent a note to the court advising it that they were unable to reach a unanimous verdict. Both defense attorneys again moved for a mistrial, and their motions were granted by the court.

On January 11, 1991, during a scheduled calendar call, the court informed the parties that petitioners' wives and petitioner Cosentino's son would be barred from the courtroom during the second trial due to their involvement in the courtroom disruption which occurred during the first trial in this matter. Transcript of Calendar Call Before Hon. Donald Silverman, at 5-7 (Jan. 11, 1991). Petitioners moved, pursuant to Article 78 of the Civil Practice Law and Rules, for an order prohibiting retrial of the matter on double jeopardy grounds; an order reversing the trial court's order barring

---

As I indicated to the jury, one unlike any that I've ever seen or the attorneys have ever seen, as they indicated to me. And we had, I'd say, at least half a dozen or so court officers here and there were not enough for--we had to send the jury back into the jury room, we had to get the Defendants out of the courtroom and we had to do what we could, the court officers had to do what they could to get the disruptive people off the floor and eventually accomplished doing that. But the scene played out in front of the jury was a terrible one and their state of--I guess you'd have to say emotional distress at this point in time is certainly understandable to this court.....

Trial Transcript, at 1725-1726 (Oct. 31, 1990).

four [3] family members from the courtroom during the re-trial of this matter and to obtain certain discovery materials prepared by federal authorities Petitioners' motion was denied.

After a second consolidated jury trial, petitioners each were convicted of the crimes of murder in the second degree and criminal possession of a weapon in the third degree (two counts). Pursuant to these convictions, on May 31, 1991, petitioners were sentenced to concurrent terms of imprisonment of twenty-five years to life for the crime of murder in the second degree and two and one-third to seven years for the crime of criminal possession of a weapon in the third degree (two counts).

On appeal to the Appellate Division, petitioners argued *(inter alia)* that the trial court's closing of the proceedings to their families deprived them of their constitutional right to a public trial. The Appellate Division affirmed. *People v. Magana*, 198 A.D. 2d 306, 603 N.Y.S. 2d 772 (2d Dept. 1993); *People v. Cosentino*, 198 A.D.2d 294, 603 N.Y.S.2d 560 (2d Dept. 1993). Petitioners' motion for leave to appeal to the New York Court of Appeals was denied. *People v. Cosentino*, 83 N. Y.2d 909, 614 N.Y.S.2d 391 (1994); *People v. Magana*, 82 N.Y.2d 927, 610 N.Y.S. 2d 179 (1994).

Petitioners filed a habeas petition in the district court and the petition was denied on May 10, 1996. The district court found that four-part test of *Waller v. Georgia*, 467 U.S. 39 (1984) had not been met.

The Court of Appeals, however, believed there was no need

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3. The trial judge stated that petitioners' wives and Cosentino's "son" would be barred from the second trial. However, portions of the record indicate that Cosentino's *two sons* may have been barred from the second trial. We do not deem this discrepancy significant to the issues raised in this petition.

to separately consider the factors enumerated in *Waller v. Georgia*. They held that "The deciding principle of this appeal is stated in *United States v. Fay*, 350 F. 2d 967 (2d Cir. 1965) (Lumbard, C.J.), *cert. denied*, 384 U.S. 1008 (1966):

> The Sixth Amendment provision that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,...' has always been interpreted as being subject to the trial judge's power to keep order in the courtroom. Were this not so a public trial might mean no trial at all at the option of the Defendant and his sympathizers.

Id. At 971

REASONS FOR GRANTING THE WRIT

1. The decision below raises a significant question concerning whether the factors enumerated in *Waller v. Georgia*, 467 U.S. 39 (1984) should be considered in closing the courtroom to individuals who were disruptive at a first trial.

The guarantee of a public trial is firmly embedded in our jurisprudence. *In re Oliver*, 333 U.S. 257, 273 (1984). This right, however, does not mean that the public is entitled to be present at the trial under circumstances. The right to a public trial has always been recognized as subject to the inherent power of the trial courts to administer the activities of the courtroom; suitably within the trial court's discretion is the power to monitor admittance to the courtroom, as the circumstances require, in order to prevent overcrowding, to accommodate limited seating capacity, to maintain sanitary or health conditions, and generally to preserve order and

decorum in the courtroom. *United States v. Hernandez*, 608 F.2d 741, 747 (9th Cir.) (quoting *United States ex rel Orlando v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1996).

However, a criminal Defendant's Sixth Amendment right to a public trial "may give way in certain cases to other rights or interests. "*Waller v. Georgia*, 467 U.S. 39, 45 (1984). A court may close a criminal trial over the Defendant's objection if the following requirements are met: [1] the party seeking to close the [trial] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceedings, and [4] it must make findings adequate to support the closure. *See also, Vidal v. Williams*, 31 F.3d 67 (2d Cir. 1994).

In *Vidal v. Williams*, a habeas proceeding, that Court of Appeals decided that closure of the courtroom to petitioner's family members deprived him of this Sixth Amendment right to a public trial. In *Vidal v. Williams*, the courtroom was closed to that petitioner's parents during the testimony of an undercover police officer. The State argued that it was necessary to exclude Vidal's parents to prevent them from recognizing the undercover officer during an undercover operation and disclosing his identity as retribution for their son's conviction. In reversing, this Court noted the importance of family members in attendance at a trial and that consideration must be given a less restrictive alternative:

> In sum, the state is asking this court to hold that a courtroom can be closed to a Defendant's relatives as long as the relatives live (or, presumably, work) in the county where the undercover officer operates. Such a holding would violate the rule that closure is reserved for rare circumstances in which "the balance of interests [are] stuck with special care.

> "*Waller*, 467 U.S. at 45. ***Moreover, the Supreme Court has specifically noted a special concern for assuring the attendance of family members of the accused. See In re Oliver, 333 U.S. 257, 271-272 & n.29 (1948). Finally, we observe that the trial court gave no consideration to less restrictive alternatives such as screening devices to conceal the witness's identity. See United States v. Lucas, 932 F.2d 1210, 1216-1217 (8th Cir.), cert.denied, 112 S. Ct. 399 (1991).***
>
> As the petitioner need not show prejudice, *Waller*, 467 U.S. at 49-50, we reverse the district court's denial of the Writ of Habeas Corpus, and remand for entry of an order granting petitioner's release unless that state affords him a new trial within a reasonable time.

Id. At 69 (Emphasis added.)

Thereafter, in *Ayala v. Speckard*, 89 F.3d 91 (2d Cir. 1996), that Court of Appeals held that "the trial court *must consider* reasonable alternatives to closing the proceeding" as a predicate for closing the courtroom.

Here, in light of the trial court's observation that the families of petitioners were well-behaved up to the time of the verdict, a total restriction upon access to the trial by petitioners' wives and Cosentino's son access to the trial was unwarranted and did not meet the standards imposed in *Waller*. Like the situations in *Vidal*, and *Ayala*, the trial court here did not make a finding that alternatives to this blanket prohibition would be inadequate to insure a fair trial before an impartial jury. There is no indication in the record that the court explored any less broad proscription; indeed the court discouraged counsel from even proffering possible alternatives to a blanket prohibition.

In fact, in this case, the trial court could have initially cautioned all spectators disruptions with a threat of holding them in contempt and a warning of immediate removal for themselves and others. As a last alternative, if any disturbance did occur, the trial court could have considered exclusion of family members and friends from the deliberation and verdict.

In sum, the trial judge's order to lock the courtroom to petitioners' closest family members constituted "closure" of the proceedings, especially where less onerous alternatives were appropriate and available. This "closure" deprived petitioners of their Sixth Amendment right to a public trial.

CONCLUSION

For these reasons, the judgment of the district court should be reversed and the case should be remanded for the issuance of a Writ of Habeas Corpus.

Respectfully submitted:

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 689--August Term 1996

(Argued: December 6, 1996 Decided: December 16, 1996)

Docket No. 96-2422

----------x

JOSEPH COSENTINO and ANTHONY MAGANA,

Petitioners-Appellants,

-against-

WALTER R. KELLY, Superintendent,
Attica Correctional Facility,
DANIEL SENDOWSKI, Superintendent,
Clinton Correctional Facility,

Respondents-Appellees.

----------x

B e f o r e: VAN GRAAFEILAND, JACOBS and CALABRESI,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Conner, *J.*) Denying petitioners' Writ of Habeas Corpus.

Affirmed.

JOHN J. SERGI, Assistant
District Attorney, White Plains,

NY, (Jeanine Pirro, District Attorney of Weschester County, Joseph M. Latino, Assistant District Attorney, of counsel), *for Respondents-Appellees.*

Rochman, Platzer, Fallick & Sternheim, New York, New York (Barry M. Fallick, Bobbi C. Sternheim, of counsel), *for Petitioners-Appellants*

Per Curiam:

Petitioners Anthony Magana and Joseph Cosentino's appeal from a May 13, 1996 judgment of the United States District Court for the Southern District of New York, denying their petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Magana and Cosentino challenge their state court convictions because certain of their family members, who had disrupted petitioners' first trial and precipitated a mistrial, were excluded from petitioners' second trial, at which they were convicted. We agree with Judge Conner that the state proceedings did not violate the petitioners' Sixth Amendment right to a public trial.

Magana and Cosentino each were charged with the crimes of murder in the second degree (two counts), criminal possession of a weapon in the second degree (two counts), and criminal possession of a weapon in the third degree (three counts). Both indictments charged that petitioners aided, abetted, and acted in concert with one another to accomplish the murder of one John Petrucelli in White Plains, New York on September 13, 1989.

The first trial in this case commenced on October 10,

1990 in Westchester County Court. The jury completed deliberations on October 31, 1990, and informed the court that it had reached a verdict. The jury was brought back into the courtroom and was asked by the court whether it had reached a verdict with respect to the first count charging Magana with murder in the second degree. When the jury foreperson responded, "Guilty, your Honor, " bedlam ensued. Family members and friends of the Defendants began yelling, screaming, and crying aloud, and many had to be physically restrained and removed from the courtroom. The foreperson proceeded to announce guilty verdicts for the remaining counts, but the court was then forced to order a recess to end the continuing disruption.

After the jury later returned to the courtroom, the court apologized for the disturbance. When at last the jury was polled two of the jurors had changed their verdicts, and a third juror was unsure as to her concurrence in the verdict. Another juror told the court: "The jury has fallen apart at this particular time, Judge, because of what happened in this courtroom just now and that -- none of us, I think, can right now give anything a fair answer of any kind, I am sorry."

After the jury was excused, both defense counsel moved for a mistrial. Before adjourning to consider the motion, the court recorded for the record what had transpired:

> [A]t the time that the verdict was announced there were a great many members of the [petitioners'] family, friends here, I'd say 10 to 15 and not all of them but a good many of them just went absolutely off the wall yelling and screaming, several had to be physically restrained, taken out of the courtroom, we had quite a scene here.
>
> As I indicated to the jury, one unlike any that I've ever seen or the attorneys have ever seen, as they

> indicated to me. And we had, I'd say, at least half a dozen or so court officers here and there were not enough for--we had to send the jury back into the jury room, we had to get the defendants out of the courtroom and we had to do what we could to get the disruptive people off the floor and they eventually accomplished doing that. But the scene played out in front of the jury was a terrible one and their state of -- I guess you'd have to say emotional distress at this point in time is certainly understandable to this court.

The following morning the defense attorneys renewed their mistrial motions, which the court denied. A curative instruction was then given and the jury retired to deliberate further. When they proved unable to reach a verdict after several more hours of deliberations and several read backs, defense counsel renewed their motions for mistrial, and their motions were granted.

On January 11, 1991, the court informed the parties at the scheduled conference that petitioners' wives and Cosentino's son would be barred from the courtroom during the second trial due to their involvement in the courtroom disruption at the first trial. Petitioners moved for an order prohibiting retrial on double jeopardy grounds; an order reversing the order barring the family members from the courtroom during the retrial; and for certain discovery. Petitioners' motions were denied.

After a second consolidated trial, each petitioner was convicted of murder in the second degree and criminal possession of a weapon in the third degree (two counts). On May 31, 1991, each petitioner was sentenced to concurrent terms of imprisonment of twenty-five years to life for the murder count, and two and one-third to seven years for the

weapons counts.

On appeal to the Appellate Division, petitioners argued (*inter alia)* that the trial court's closing of the proceedings to their families deprived them of their constitutional right to a public trial. The Appellate Division affirmed. *People v. Magana,* 198 A.D.2d 306, 603 N.Y.S. 2d 772 (2d Dept. 1993); *People v. Cosentino*, 198 A.D.2d 294, 603 N.Y.S. 2d 560 (2d Dept. 1993). Petitioners' motions for leave to appeal to the New York Court of Appeals were denied. *People v. Consentino,* 83 N.Y.2d 909, 614 N.Y.S.2d 391 (1994); *People v. Magana,* 82 N.Y.2d 927, 610 N.Y.S.2d 179 (1994).

Petitioners filed the instant habeas petition in the district court on May 10, 1995 and the petition was denied on May 10, 1996.

The deciding principle of this appeal is stated in *United States v. Fay*, 350 F.2d 967 (2d Cir. 1965) (Lumbard, *C.J.*), *cert.denied,* 384 U.S. 1008 (1966):

> The Sixth Amendment provision that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, ...' has always been interpreted as being subject to the trial judge's power to keep order in the courtroom. Were this not so a public trial might mean no trial at all at the option of the defendant and his sympathizers.

Id. At 971

We do not deprecate the importance of the public trial as "a safeguard against any attempt to employ our courts as instruments of persecution." *In re Oliver*, 333 U.S. 257, 270 (1948) (Black, *J.*). The accused is entitled to a public trial so that "the public may see he is fairly dealt with and not unjustly

condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their functions." *Id.* at 271 n.25 (quoting 1 Cooley, Constitutional Limitations 647 (8th ed. 1927). At the same time, "[i]t is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (Black, *J.*).

In this case, the trial judge was dealing with something more than a breach of decorum; a scene of pandemonium had directly caused a mistrial. The measure adopted by the trial judge -- an order barring a handful of family members who had rioted at the first trial -- struck a scrupulous "balance between the requirement that the actions of the courts be open to public scrutiny and the need to have the trial proceed in an orderly manner." *Fay*, 350 F.2d at 971. The order allowed access to most members of the public (and press) and many members of the defendants' families, and only barred those individuals who, in the court's judgment posed a threat to the orderly conduct of the second trial. We therefore need not separately consider the factors enumerated in *Waller v. Georgia*, 467 U.S. 39, 48 (1984), which governs the closing of the courtroom to peaceable individuals or to the public at large.

Accordingly, petitioners were not denied their right to a public trial and the judgment of the district court is affirmed.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of December, one thousand nine hundred and ninety-six.

PRESENT: Hon. Ellsworth A. Van Graafeiland
Hon. Dennis G. Jacobs
Hon. Guido Calabresi
Circuit Judges.

Docket No: 96-2422

---x

JOSEPH COSENTINO and ANTHONY MAGANA,
Petitioners-Appellants,

-against-

WALTER KELLY, Superintendent of Attica Correctional Facility, DANIEL SENKOWSKI, Superintendent of Clinton Correctional Facility,
Respondents-Appellees.

---x

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby *ORDERED, ADJUDGED*, and *DECREED* that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By:
S\
Beth J. Meador
Administrative Attorney

Filed: December 16, 1996
United States Court of Appeals

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOSEPH COSENTINO and
ANTHONY MAGANA,

Petitioners, 95 Civ. 3388 (WCC)

-against- **OPINION AND ORDER**

WALTER KELLY, SUPERINTENDENT
OF ATTICA CORRECTIONAL FACILITY,
and DANIEL SENKOWSKI, SUPERINTENDENT
OF CLINTON CORRECTIONAL FACILITY,

Respondents.

----------x

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White Plains, New York 10601

JULIANNE BURRELL NEWMAN, ESQ.
JOSEPH M. LATINO, ESQ.
Asst.. District Attorneys
Of Counsel

Conner, Sr. D.J.:

Joseph Cosentino and Anthony Magana have filed this petition for a writ of *habeas corpus*, pursuant to 28 U.S.C. § 2254 *et seq*. Petitioners request a writ of *habeas corpus* on the ground that their Sixth Amendment right to a public trial was violated. Having raised this issue in their state court proceedings, petitioners have exhausted available state remedies. For the reasons discussed below, the petition is denied.

BACKGROUND

Petitioners Anthony Magana and Joseph Cosentino each were charge with the crimes of murder in the second degree, criminal use of a firearm in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), and criminal possession of a weapon in third degree (three counts). Both indictments charged that petitioners aided,

abetted, and acted in concert with one another to accomplish the murder of John Petrucelli in White Plains, New York on September 13, 1989[1].

The first jury trial in this matter commenced on October 10, 1990 before the Honorable Donald Silverman, County Court, Westchester County. The jury completed deliberations on October 31, 1990, and informed the court that it had reached a verdict. Prior to bringing the jury into the courtroom, the court cautioned spectators to maintain control of themselves when the verdict was read. After the jury entered the courtroom, the court asked the jury what verdict it had reached with respect to the first count charging petitioner Magana with murder in the second degree. The jury foreperson responded, "Guilty, your Honor." At this point, a major disruption ensued involving family members and friends of petitioners, and certain spectators had to be removed everyone from the courtroom.

The jury later re-entered the courtroom, at which time the court expressed its apologies for the earlier disruption. When the jury was polled, two of the jurors changed their verdicts, and a third juror was unsure. Another juror addressed the court stating, "The jury has completely fallen apart at this particular time, judge, because of what happened in this courtroom just now and that -- none of us, I think, can right now give anything a fair answer of any kind. I'm sorry." Trial Transcript, at 1724-1725 (Oct. 31, 1990).

After the jury was excused, both defense attorneys moved for a mistrial. The court stated, on the record, the essence of the disruption that had just occurred in the courtroom. Specifically, the court stated that "at the time the verdict was announced there was a great many members of the

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The following morning, both defense attorneys renewed their motions for a mistrial, which were denied. A curative

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2. This portion of the record reads in full as follows:

> *THE COURT:* Let me just state for the record that which is not already on the record and that is that at the time that the verdict was announced there were a great many members of the defendants' family, friends here, I say 10 to 15 and not all of them but a good many of them just went absolutely off the wall yelling and screaming, several had to be physically restrained, taken out of the courtroom, we had quite a scene here.
>
> As I indicated to the jury, one unlike any that I've ever seen or the attorneys have ever seen, as they indicated to me. And we had, I'd say, at least half a dozen or so court officers here and there were not enough for --we had to get the defendants out of the courtroom and we had to do what we could, the court officers had to do what they could to get the disruptive people off the floor and they eventually accomplished doing that. But the scene played out in front of the jury was a terrible one and their state of--I guess you'd have to say emotional distress at this point in time is certainly understandable to this court.....

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instruction was given to the jury, but, after several more hours of deliberations and several read backs, the jury sent a note to the court advising it that they were unable to reach a unanimous verdict. Both defense attorneys again moved for a mistrial, and their motions were granted by the court.

On January 11, 1991, during a scheduled calendar call, the court informed the parties that petitioners' wives and petitioner Cosentino's son would be barred from the courtroom during the second trial due to their involvement in the courtroom disruption which occurred during the first trial in this matter. Transcript of Calendar Call Before Hon. Donald Silverman, at 5-7 (Jan. 11, 1991). Petitioners moved, pursuant to Article 78 of the Civil Practice Law and Rules, for an order prohibiting retrial of the matter on double jeopardy grounds; an order reversing the trial court's order barring four[3] family members from the courtroom during the re-trial of this matter; and to obtain certain discovery materials prepared by federal authorities. Petitioners' motion was denied.

After a second consolidated jury trial, petitioners each were convicted of the crimes of murder in the second degree and criminal possession of a weapon in the third degree (two counts). Pursuant to these convictions, on May 31, 1991, petitioners were sentenced to concurrent terms of imprisonment of twenty-five years to life for the crime of murder in the second degree and two and on-third to seven years for the crimes of criminal possession of a weapon in the third degree (two

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3. The trial judge stated that petitioners' wives and Cosentino's "son" would be barred from the second trial. However, portions of the record indicate that Cosentino's *two sons* may have been barred from the second trial. We do not deem this discrepancy significant to the issues raised in this petition.

counts).

Notices of Appeal were filed and the appeal was perfected.[4] On appeal, petitioners argued that (1) the trial court's closure of the proceedings to their families deprived them of their constitutional right to a public trial; (2) the trial court improperly failed to make reasonable inquiry of each juror about petitioner Cosentino's involvement with organized crime; (3) the trial court should have ordered the Westchester County District Attorney to turn over to defense counsel all discovery materials prepared by federal authorities; and (4) petitioner Cosentino was denied a fair trial by the prejudicial statements in the prosecutor's summation. The judgements of the conviction were affirmed by decision and orders of the Appellate Division. *People v. Magana,*603 N.Y.S.2d 772 (N.Y. App. Div. 1993). *People v. Cosentino,* 603 N.Y.S. 2d 560 (N.Y. App. Div. 1993). Petitioners sought leave to appeal to the New York Court of Appeals Petitioners' applications were denied. *People v. Cosentino,* 614 N.Y.S.2d 391 (N.Y. 1994); *People v. Magana* 610 N.Y.S.2d 179 (N.Y. 1994). Petitioners then filed the instant application for *habeas corpus*, and this Court directed respondents to answer by November 27, 1995.

DISCUSSION

The Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees that a criminal defendant shall enjoy the right to a "public trial." U.S. Const. Amend. VI; *In re Oliver*, 333 U.S. 257, 266 (1948). This right assures the public that the defendant is dealt with fairly, protects

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4. By Decision and Order dated March 10, 1992, the Supreme Court, Appellate Division, Second Department granted petitioners' motion to consolidate their state appeals.

against prosecutorial and judicial misconduct, encourages witnesses to come forward and discourages perjury. *Waller v. Georgia*, 467 U.S. 39, 46 (1984). It may also cause all trial participants to perform their duties more conscientiously and gives the public an opportunity to observe the judicial system. *Gannett Co. V. DePasquale*,443 U.S. 368, 383 (1979). The exclusion of the courtroom observers, especially a defendant's family members and friends, even from part of a criminal trial, is not a step to be taken lightly. *Guzman v. Scully*, 80 F.3d 772, __, 1996 WL 163034, at *5 (2d Cir. April 8, 1996). Moreover, it is well-settled that a defendant whose right to a public trial has been violated need not show that he suffered any prejudice, and the doctrine of harmless error does not apply. *Waller*, 467 U.S. at 49-50 & n.9; *Guzman*, 1996 WL 163034, at *5; *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994), *cert. denied*, __U.S. __, 115 S. Ct. 778 (1995); *Ip v. Henderson*, 710 F. Supp. 915, 919 (S.D.N.Y.), *aff'd mem.*, 888 F.2d 1376 (2d Cir. 1989).

The right to a public trial is not absolute, however, and in some instances must yield to other interests, such as those essential to the administration of justice. *Waller*, 467 U.S. at 45. In *Waller*, the Supreme Court identified four requirements that must be met before public access to a criminal proceeding may be denied: "[1] [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceedings, and [4] it must make findings adequate to support the closure." *Waller*, 467 U.S. at 48; *see Vidal*, 31 F.3d at 69; *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992). Where a court orders only partial closure, rather than complete closure, the first requirement -- an "overriding interest" in favor of closure -- is somewhat relaxed. In those situations, a "substantial reason,"

rather than an overriding interest," satisfies the first criterion because "a partial closure does not implicate the same secrecy and fairness concerns that a total closure does." *Woods*, 977 F.2d at 76; *see United States v. Doe*, 63 F.3d 121, 129 (2d Cir. 1995).

I. Substantial Reason

Petitioners do not seriously dispute that prevention of mistrial in a criminal case constitutes a "substantial reason" to order a partial closure. "The right to a public trial 'has always been interpreted as being subject to the trial judge's power to keep order in the courtroom. Were this not so a public trial might mean no trial at all at the option of the defendant and his sympathizers.'" *United States ex re. Orlando v. Fay*, 350 F.2d 967, 971 (2d Cir. 1965), *cert. denied*, 384 U.S. 1008 (1966) (closure appropriate to avoid disorder), *cert. denied sub nom. Wallace v. United States*, 430 U.S. 908 (1977); *Fay* 350 F.2d at 971 (closure appropriate to maintain order in the courtroom). Indeed, "[w]hen the trial judge has reason to believe that any persons or any groups of spectators are disorderly and may continue to do so he may exclude individuals or groups as the occasion requires." *Fay*, 350 F.2d at 971.

II. Narrowly Tailored

We turn to whether the partial closure was narrowly tailored to exclude spectators only to the degree necessary to satisfy the objective for which it was ordered. At a calendar call on January 11, 1991, the trial court discussed its decision to order a partial closing of the second trial as follows:

> THE COURT: [N]ow, as a result of the disturbance that we had in court last time, it is my intention to bar

from the courtroom the wives of the defendants and the son of the defendant Cosentino, and I think you gentleman [sic] can understand why.

I think if we eliminate them, most of the others that were present didn't cause a sufficient amount of disturbance that I would bar them, but those particular individuals did and they will be barred from the courtroom.

MR. CARROZZA [for Cosentino]: May I be heard as it impacts my client? Of course strenuously object to that and I do admit quite candidly there was a disturbance at the time of the verdict, but there was not difficulties [sic] whatsoever even in this overcrowded courtroom throughout the trial, so I think the actions taken by your Honor...
Are most respectfully somewhat excessive and I submit that it deprives my defendant of the solace of having his family in the courtroom when he is on trial. That is the whole idea of a public trial.

THE COURT: Yes, they have a right to be here unless they do something to forfeit that right and they did that in this particular case and the record of what occurred at that time speaks for itself, so I don't think I have to restate everything that was said at that point in time, but the disturbance was very bad one.

Even in your own extensive experience I am sure you have seen very few disturbances which would approach that one.

I was kind enough that I didn't hold them in contempt, of course, because I think I understood the emotion, the genuine emotion that they felt at that

> time, but they also exhibited an inability to control their emotions and what was done in this court was inexcusable and I won't allow the opportunity for it to happen again.
>
> MR. ROCHMAN [for Magana]: In no way to offend this Court, I will ask you to allow the people there. I take strong exception to the review that a defendant's family should not be present when he is faced with a mandatory minimum of fifteen to life on this particular case should he be convicted.
>
> THE COURT: One of the reasons I wanted this calendared now was to advise you of the Court's intention at this time, and if you want to bring motions you can bring them.

Transcript of Calendar Call Before Hon. Donald Silverman, at 5-8 (Jan. 11, 1991).

Petitions maintain that the trial judge issued too broad a closure by excluding the petitioners' family members from the entirety of the second trial, rather than excluding them from only the announcement of the verdict. It is impossible to say with certainty whether a more narrow closure -- such as one in which some family members were excluded only during the announcement of the verdict as petitioners suggest -- would have been sufficient. Based on the disturbance that occurred in the first trial, we conclude that the trial judge's order struck an appropriate balance between the interest in conducting an orderly trial and petitioners' interest in being afforded a "public trial."

Petitioners argue that the court should have allowed all the family members to remain throughout the second trial, relying on an admonition by the court that outbursts will not be tolerated. However, the family members had demonstrated once already that an admonition from the court was no assurance that chaos would not break out in the courtroom. The mistrial in the first case resulted in a substantial waste of the parties' and the court's limited resources. There was no way to predict when defendants' family members might cause another disruption; lacking knowledge as to when another disturbance would erupt again, the trial court was not required to limit its exclusion of family members to that portion of the second trial where the disruption in the first trial occurred.

Also, the record reflects that only some of the family members who were involved in the disruption were excluded.[5] The trial judge excluded only those members who were most responsible for the disruption, and no others. This served the added purpose of deterring any future disruption on the part of those who were allowed to remain despite their involvement in the disruption of the first trial. The purposes of the Sixth Amendment was intended to prevent. *See In re Oliver*, 333 U.S. at 270-271. The transcript of the second trial became a public record, and those who were barred from the second trial were free to communicate with friends and family members who were not excluded.

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5. The record indicates that 10 to 15 members of petitioners' families and friends 'went absolutely off the wall." Since the trial judge barred only three members -- Cosentino's wife, Magana's wife, and Cosentino's son -- it must mean that other family members and friends who were involved in the disruption were nonetheless permitted to attend the second trial. We conclude from these facts that the trial judge struck an appropriate balance between competing interests.

III. Investigate Alternatives

Petitioners argue that *Guzman* stands for the proposition that prior to imposing closure, a court must make a finding that alternatives to a "blanket prohibition" would be inadequate to insure a fair trial before an impartial jury. At the trial of defendant in *Guzman*, just prior to the cross-examination of prosecution witness, the State requested that the trial court exclude four women, who the State asserted were friends or family members of another witness, from the courtroom during the cross-examination. The State claimed that their presence in the courtroom was intimidated to the prosecution witness. Defense counsel represented to the court that two of the four women were related to this other witness, but the other two women were "not so related but are either familially or socially related to [the defendant]." *Guzman*, 1996 WL 163034, 15 *2. The trial court then, without conducting any further inquiry, immediately granted the prosecution's request, stating the following by way of justification: "In order to facilitate the [prosecution] witness's being able to testify without interference, without fear, without concern which apparently he has communicated, I will then exclude the [four women] only during the testimony of the witness." *Id.* The Second Circuit found this reasoning insufficient in the face of defendant's constitutional challenge:

> The trial court based its decision solely upon representations made by the prosecutor that [the prosecution witness] felt intimidated by the presence of these four women in the courtroom. The trial court, however, did not inquire of the witness whether he in fact felt intimidated nor whether his fear, if genuinely held, was sufficiently well-founded to constitute an "overriding interest" within the meaning

> of *Waller*, or at least a "substantial interest" within the meaning of *Woods*. Indeed, the trial court made no inquiry whatsoever. Although this Circuit has not required that a separate hearing must always be held before the courtroom doors may be closed, the lack of such a hearing is relevant to the lawfulness of any closure.....
>
> Even more disturbing is the fact that when defense counsel pointed out that two of the women were not related to [the other witness], as the prosecution had alleged, but were instead related to the defendant, the trial court still did not make any inquiry to ascertain the relevant facts. If that inquiry had confirmed defense counsel's assertion that two of the women were part of [defendant's] family or at least his friends, then the trial court would have been obliged to give significant weight to this circumstance in determining whether closure was warranted.

Id. at *3. The court went on to say that the trial court's partial closure of its courtroom violated the defendant's right to a public trial, primarily because "the trial court relied on the unsubstantiated statements of the prosecutor, rather than conducting an inquiry of the prosecution witness on whose behalf the closure request was made." *Id.* at *4. Furthermore, the court held that "[w]ith the interest in favor of closure merely alleged but not established, there could be no compliance with the second requirement that the closure be 'no broader than necessary to protect' the interest." *Id.* "The third requirement of considering alternatives to closure was not even attempted to be met. Since there was no issue of concealing the witness's identity from the four women but only a claim of intimidation by their presence, seating them at the rear of the courtroom might

well have sufficed to allay whatever legitimate anxiety, if any, the witness may have apprehended." *Id.* Finally, the trial court's conclusory justification for excluding the four women failed to satisfy the fourth requirement of "findings adequate to support the closure." *Id.*

Relying on *Guzman*, petitioners argue that there is no indication in the record that the court explored any alternatives or considered imposing any less broad proscription. We disagree. It should be noted that *Waller*'s third requirement--that the trial court investigate alternatives to its closure order--is not a high hurdle to overcome. For example, in *Woods*, 977 F.2d at 77, the trial court asked the witness if it was true that she was reluctant to testify because of certain fears that she had for the safety of herself and her family; the witness responded "yes," and the trial court informed her that the courtroom had been cleared of the defendant's family members. The Second Circuit held that this brief inquiry investigating possible alternatives to the partial closure order was sufficient. *Id.* In *Guzman*, the Second Circuit found that the trial court had failed even to seek alternatives, and distinguished *Woods* based on the brief investigation that the trial court in *Woods* conducted. *Guzman*, 1996 WL 163064, at *4-5.

The instant case is distinguishable from *Guzman*. Essentially, the entire closure request in *Guzman* was based on speculation. *See Guzman*, 1996 WL 163064, at *4. In the instant case, the trial court's decision was based on the actual events of the first trial, where, upon announcement of the jury's guilty verdict, bedlam broke out in the courtroom among petitioners' family members and friends, and some of them had to be restrained physically and removed from the courtroom. This disruption took place after the trial court had admonished all spectators against precisely such misconduct. The disruption directly affected the jury to the extent that some of them

changed their previously reported verdicts of guilty. Thus, unlike the *Guzman* case, the trial court here had a substantial basis for its partial closure ruling in the second trial. Moreover, the trial court only barred those few family members that were most responsible for the disruption in the first trial. On this record, it cannot be said that the trial court acted based on speculation or without regard for the rights of the accused. Surely, the trial court should not have had to risk a second mistrial, caused by a few spectators who had demonstrated a disregard for the court's directives.

Petitioners reiterate that the judge should have considered excluding the family members only during the reporting of the verdicts. The record does not indicate whether the trial court considered this more limited exclusion. However, given that one disruption had occurred already after announcement of the verdict in the first trial, it was not unreasonable for the trial court to conclude that it was necessary to exclude the instigating family members during the entirety of the second trial, as a disruption at any point of the second trial could have led to a second mistrial. The partial closure that was ordered was one of the less restrictive alternatives available to the court. It excluded only those few family members who were most responsible for instigating the disturbance in the first trial, as opposed to excluding all ten to fifteen family members and friends who were involved in the disruption.

IV. Findings to Support Closure

The Supreme Court's final requirement is that the trial court make findings adequate to support the closure. The purpose of this requirement is to allow a "reviewing court [to] determine whether the closure order was properly entered." *Waller,* 464 U.S. at 45 (quoting *Press-Enterprise Co. v.*

Superior Court of California, 464 U.S. 501, 510 [1984]). The trial judge in the instant case made a point of describing for the record the disturbance that erupted in the first trial. Furthermore, the trial judge discussed with the attorneys his decision to order partial closure, and stated for the record why he was ordering partial closure. After a thorough review of the record, we conclude that the trial court made findings adequate to support the partial closure of petitioners' second trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of *habeas corpus* is denied.

SO ORDERED.

May 10, 1996

White Plains, New York

S\
Senior U.S. District Judge